90-413

No.

IN THE
Supreme Court of the United States
October Term, 1990

CLARENCE KIMMET AND KARA KIMMET, an infant, by and through her parent and next friend Clarence Kimmet,

Petitioners,

and

RUTH KIMMET,

Plaintiff,

v.

DAVID RYAN; DIANE DENISON; and ARAPAHOE COUNTY SOCIAL SERVICES, a department of social services for the State of Colorado,,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Doris Besikof
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(303) 753-9999
COUNSEL OF RECORD FOR
PETITIONERS AND PLAINTIFF

QUESTION PRESENTED

Whether or not in 1986, a reasonable social worker would have understood that it was a violation of the Petitioners' Fourteenth Amendment rights to life, liberty, due process and equal protection of the laws:

to demand a confession to child abuse in exchange for returning a two-month-old, nursing infant to her parents;

to threaten to retaliate by separating a baby from her parents longer, if the parents exercised their right to oppose social services' position in juvenile court proceedings; and

to threaten an attorney with a dependency and neglect action against the attorney, while the attorney was negotiating for the return of an infant to her parents?

PARTIES TO THE PROCEEDING

Clarence Kimmet
Kara Kimmet, an infant, by and through her parent and next friend Clarence Kimmet
16231 E. Alabama Drive
Aurora, Colorado 80017

Petitioners,

Ruth Kimmet
16231 E. Alabama Drive
Aurora, Colorado 80017

Plaintiff,

and

David Ryan
1400 W. Littleton Blvd.
Littleton, Colorado 80120

Respondent,

Diane Denison
1400 W. Littleton Blvd.
Littleton, Colorado 80120

Respondent,

and

Arapahoe County Social Services, a department of social services for the State of Colorado
1400 W. Littleton Blvd.
Littleton, Colorado 80120

Respondent.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

No. _____

CLARENCE KIMMET AND KARA KIMMET, an infant, by and through her parent and next friend Clarence Kimmet,

Petitioners,

and

RUTH KIMMET,

Plaintiff,

v.

DAVID RYAN; DIANE DENISON; and ARAPAHOE COUNTY SOCIAL SERVICES, a department of social services for the State of Colorado,,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Clarence Kimmet and Kara Kimmet, an infant, through her parent and next friend Clarence Kimmet, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit upholding the Order of the United States District Court for the State of Colorado, granting defendants' motion for summary judgment (Appendix E, infra), is not reported. The opinion of the District Court granting summary judgment (Appendix F, infra), and the order of the magistrate, which the District Court opinion affirms (Appendix G, infra), are not reported.

JURISDICTION

The order of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was entered April 25, 1990; and the order denying a rehearing was entered June 13, 1990. This Court has statutory jurisdiction to review the judgment in question by a writ of certiorari pursuant to 28 U.S.C. 1254(1). Jurisdiction over

the suit in the United States District Court for the State of Colorado, is based upon 42 U.S.C. 1983 and 1988, and upon 28 U.S.C. 1341 and 1343(3) and (4).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment XIV (Appendix H, infra); 42 U.S.C. 1983, 1988 (Appendix I, infra); and Federal Rule of Civil Procedure 56(c) (Appendix J, infra).

STATEMENT

In May, 1986, Kara Kimmet, age two months, the daughter of Clarence and Ruth Kimmet, stopped breathing at her sitter's. She was taken by ambulance to a hospital, where doctors believed she had been shaken. The doctors contacted social services, which petitioned the local district court for temporary legal custody. Kara's condition stabilized. She was ready for

discharge in a few days; but social services delayed her return to her parents for an additional two months. During this time, while they had physical and legal control of Kara, social services demanded that the parents confess to child abuse in exchange for Kara's return to them (Appendices A, B and C, infra). They also threatened to retaliate against the parents and Kara by increasing the time that they would be separated, if the parents opposed social services' position in juvenile court proceedings (Appendices A and D, infra). They also threatened the parents' attorney with a dependency and neglect action concerning the attorney's own child, while the attorney was negotiating for return of the infant Kara to her parents (Appendix A, infra).

Kimmets did not yield to the demands that they confess to abuse; and the juvenile court proceedings against them

were eventually dismissed. Clarence, Ruth and Kara filed this action for monetary damages under 42 U.S.C. 1983 and 1988 (Appendix I, infra), for violation of their Constitutional rights (Appendix H, infra) by persons acting under color of state law.

The district court entered Summary Judgment in favor of the defendants, adopting the Magistrate's Recommendation; even though uncontroverted, sworn testimony of two attorney witnesses established that the alleged abusive conduct by the defendants had, in fact, occurred (Appendices F and G, infra).

REASONS FOR GRANTING THE WRIT

The question submitted in this petition is of special importance, because abuses of power and infringements upon individual rights, beyond what is necessary to protect children occur; when social workers exercise unbridled power. The

doctrine of qualified immunity has been improperly applied to immunize violative conduct by social workers in this case.

The court below recognized the controlling law, Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); and Anderson v. Creighton, 438 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). However, neither the Tenth Circuit, the District Court, nor the Magistrate discussed the demand for confession, the threat of retaliation and the threat against petitioner's counsel. Thus, the law was never applied to the central facts in this case.

The issue in this case is not whether social services should have become involved; or whether they should have taken custody of Kara.

The issue is: whether or not in 1986, a reasonable social worker would have

understood that withholding a child from her parents to obtain a confession from the parents; threatening to retaliate against the parents by increasing the period of separation of the parents from the child; and threatening the parents' attorney, all violated the parents' and the child's clearly established, Fourteenth Amendment rights to life, liberty, due process and equal protection of the laws - rights of which a reasonable person [including a social worker] would have known in 1986.

The United States Court of Appeals has decided an important question of federal law, the violation of Fourteenth Amendment rights, in a way that conflicts with applicable decisions of this Court, the Constitution and 42 U.S.C. 1983. Lynumn v. State of Illinois, 372 U.S. 917 (1963), holds that coercion of a confession from a mother of young children is a violation of the Due Process Clause of the Fourteenth

Amendment. See also, Santosky v. Kramer, 102 S.Ct. 1333, 1394-95 (1982); Ingraham v. Wright, 430 U.S. 651, 673 (1977); Rochin v. California, 342 U.S. 165 (1952).

The decision in this case conflicts with decisions in other circuits. For example, U.S. v. Tingle, 658 F.2d 1332 (9th Cir. 1981), holds that when law enforcement officers threaten and frighten a parent that she or he will not see their child in order to elicit "cooperation," such conduct is patently coercive and a violation of Constitutional rights.

Prior decisions in the Court of Appeals for the Tenth Circuit conflict with its decision in this case. The use of coercion and physical detention in order to obtain a confession were held to be a violation of Constitutional rights, actionable under § 1983 in Rex v. Teeples, 753 F.2d 841, 843 (10th Cir. 1985).

The sworn testimony of witnesses (Appendices A through D, infra) establishes evidence of conduct by the defendants upon which a reasonable jury could have found that there had been a violation of Kimmets' Fourteenth Amendment Rights by persons acting under color of state law. 42 U.S.C. 1983 (Appendix I, infra). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, at 251, 252 (1986). There was a genuine issue of material fact in this case; and summary judgment should not have been granted. Federal Rule of Procedure 56(c) (Appendix J, infra).

CONCLUSION

A Supreme Court ruling is needed, which will make it clear that social workers' gratuitous abuses of power, which do nothing to benefit children, are not

protected by qualified immunity; and are subject to legal scrutiny.

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APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Case No. 86-K-778

CLARENCE KIMMET, RUTH KIMMET, and KARA KIMMET, an infant, by and through her parents and next friends, CLARENCE AND RUTH KIMMET,

Plaintiffs,

vs.

DAVID RYAN, DIANE DENNISON, and ARAPAHOE COUNTY DEPARTMENT OF SOCIAL SERVICES, a department of social services for the State of Colorado,

Defendants.

DEPOSITION OF REBECCA SPARLING GLEASON[1]

APPEARANCES:

FOR THE PLAINTIFFS: DORIS BESIKOF
1000 SO. BIRCH ST.
DENVER, CO 80222

FOR THE DEFENDANTS: JAMES E. HEISER
5334 SO. PRINCE ST.
4TH FLOOR
LITTLETON, CO 80166

SUSAN BROYLES-LAYTON
6785 SO. RACE STREET
LITTLETON, CO 80122

---

[1] This testimony was quoted and presented to the Magistrate, the District Court and the Court of Appeals for the Tenth Circuit in the body of motions and/or appended thereto.

ALSO PRESENT: RUTH KIMMET

COURT REPORTER: CHERI TYLER, C.S.R.
PATTERSON REPORTING
50 SO. STEELE ST.
SUITE 950
DENVER, CO 80209
(303) 320-6628

REBECCA GLEASON (KIMMETS' ATTORNEY): . . . I FELT LIKE THE TENOR -- AND THAT'S WHAT YOU ASKED ME ABOUT EARLIER -- BUT A CONSTANT REFRAIN IN MY CONVERSATIONS WITH DIANE. "IF YOUR CLIENTS WILL ONLY ADMIT THEY DID THIS, WE WOULD BE COMFORTABLE RETURNING THE BABY. IF THEY WILL NOT ADMIT THEY DID THIS, THEN WE CANNOT RETURN THE BABY." . . .

Q HEISER: ARE YOU PERFECTLY SURE THAT IT IS EXACTLY WHAT SHE SAID?

A GLEASON: IT WAS SAID ON MORE THAN ONE OCCASION. (P. 33, l. 4-23.)

. . . IT WASN'T SO MUCH CONCERN FOR KARA AND WHAT WAS BEST FOR KARA, BUT THAT THEY HAD TAKEN A POSITION, AND THEY FELT THEY HAD TO JUSTIFY IT. AND THEY NEEDED

THE KIMMETS TO GIVE THEM THAT JUSTIFICATION. (P. 51, l. 24 to p. 52, l.2.)

. . . MOST IMPORTANTLY IN THE CONVERSATION, WHICH WILL ALWAYS STAND OUT IN MY MIND, OCCURRED AROUND MID-JUNE. I COULD FIND THE EXACT DATE, BECAUSE I CALLED MY FATHER-IN-LAW RIGHT AFTERWARDS AND ASKED HIM TO NOTE THE DATE AND THE FACT I HAD MADE THE CALL. . . . I WAS TALKING ABOUT HOW UNBELIEVABLE IT WAS TO ME THAT ANYONE COULD SUSPECT THE KIMMETS OF THIS.

SHE MADE WHAT I FELT WAS A VERY PERSONAL THREAT. SHE SAID TO ME, "WELL, YOU HAVE A CHILD, DON'T YOU? ANYONE CAN HAVE A D AND N FILED ON THEM." AND THERE WAS THIS TERRIFICALLY LONG PAUSE IN THE CONVERSATION BECAUSE I COULDN'T THINK OF ANYTHING TO RESPOND TO THAT. SHE STARTED TO TALK AGAIN AND TELLING ME THAT -- I FELT WHAT SHE WAS DOING -- SHE WAS TALKING

VERY QUICKLY. I FELT SHE WAS TRYING TO COVER THAT MOMENT. (P. 27, l. 4-20.)

Q HEISER: WITH REGARD TO THE PHONE CALL IN MID-JUNE, YOU SAID YOU CALLED YOUR FATHER-IN-LAW. I GATHER THAT YOU INTERPRETED THE PHONE CALL AS A PERSONAL THREAT? YOU TESTIFIED TO THAT.

A GLEASON: YES, I DID. (P. 29, l. 22 to p. 30, l. 1.)

Q HEISER: IS IT POSSIBLE THAT YOU MISINTERPRETED WHAT SHE WAS SAYING IN LIGHT OF THE FURTHER REMARKS THAT YOU DESCRIBED THAT SHE WAS LIGHTHEARTED IN SAYING THAT A COMPLAINT HAD BEEN FILED AGAINST HER?

A GLEASON: . . . NO. ONE, SHE WAS LIGHTHEARTED IN TELLING THESE STORIES. SHE WAS TRYING TO COVER THAT MOMENT. I WOULD SAY THERE WERE PROBABLY A FEW MOMENTS OF PERFECT UNDERSTANDING, BUT I KNEW WHAT SHE MEANT WHEN SHE WAS SAYING THAT. THERE IS NO QUESTION IN MY MIND

FROM THAT DAY TO THIS WHAT SHE WAS SAYING TO ME. (P. 31., l. 2-12.)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 86-K-778

CLARENCE KIMMET, RUTH KIMMET, and KARA KIMMET, an infant, by and through her parents and next friends, CLARENCE AND RUTH KIMMET,

Plaintiffs,

vs.

DAVID RYAN, DIANE DENNISON, and ARAPAHOE COUNTY DEPARTMENT OF SOCIAL SERVICES, a department of social services for the State of Colorado,

Defendants.

DEPOSITION OF NANCY J. HUTCHINSON[2]

APPEARANCES:

FOR THE PLAINTIFFS: DORIS BESIKOF
1000 SO. BIRCH ST.
DENVER, CO 80222

FOR THE DEFENDANTS: JAMES E. HEISER
5334 SO. PRINCE ST.
4TH FLOOR
LITTLETON, CO 80166

SUSAN BROYLES-LAYTON
5785 SO. RACE STREET
LITTLETON, CO 80122

---

[2] This testimony was quoted and presented to the Magistrate, the District Court and the Court of Appeals for the Tenth Circuit in the body of motions and/or appended thereto.

ALSO PRESENT: DAVID RYAN
RUTH KIMMET

COURT REPORTER: CHERI TYLER, C.S.R.
PATTERSON REPORTING
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DENVER, CO 80209
(303) 320-6628

NANCY HUTCHINSON (KIMMETS' ATTORNEY): . . . STATEMENTS WERE MADE TO THE EFFECT THAT IF ONE OF THEM WOULD JUST ADMIT TO THE ALLEGATION, THE BABY COULD COME HOME; THAT IT WAS AN ISOLATED INCIDENT; THAT WE'RE NEVER GOING TO KNOW WHO DID IT. WE REALLY THINK IT HAPPENED. IF ONE OF THEM WOULD JUST ADMIT TO IT, IT WILL ALL BE OVER. (P.48, l. 1-6.)

MY RECOLLECTION IS THERE WAS A CONVERSATION. MR. RYAN WAS PRESENT. MS. DENNISON WAS PRESENT. SUSAN BROYLES-LAYTON WAS PRESENT. WAYDINE WAS PRESENT. MR. AND MRS. KIMMET WERE PRESENT. . . . AT THAT POINT A COMMENT WAS MADE. I DO NOT RECALL -- I BELIEVE IT WAS DIANE

DENNISON WHO MADE THE REMARK, "YOU KNOW, STATISTICALLY IF CHILDREN ARE PLACED IN FOSTER CARE, THEY'RE THERE UP TO A YEAR OR MORE." (P. 34, l. 15 to p. 35, l. 4.)

AT THAT POINT, MRS. KIMMET BECAME EXTREMELY UPSET. SHE LEFT THE CONVERSATION. SHE WAS CRYING. SHE SAID ESSENTIALLY AFTER THAT HAPPENED, "WE'LL GO ALONG WITH WHATEVER YOU SAY." MR. KIMMET WAS ALSO VERY UPSET, AND IT WAS CLEAR TO ME, AS I'M SURE IT WAS CLEAR TO THE KIMMETS, THAT THE INTENTION WAS, IF WE GO AND WIN, THAT KID WOULD BE GONE FOR A LONG TIME. (P. 35, l. 5-11.)

. . . MRS. KIMMET BELIEVED THAT REMARK TO BE THE TRUTH, AND HER REACTION WAS INSTANTANEOUS. SHE SAID, "FORGET IT. LET'S DO IT. I CAN'T STAND IT." (P. 40, l. 8-10.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 86-K-778

CLARENCE KIMMET, RUTH KIMMET, and KARA KIMMET, an infant, by and through her parents and next friends, CLARENCE AND RUTH KIMMET,

Plaintiffs,

vs.

DAVID RYAN, DIANE DENNISON, and ARAPAHOE COUNTY DEPARTMENT OF SOCIAL SERVICES, a department of social services for the State of Colorado,

Defendants.

DEPOSITION OF CLARENCE KIMMET[3]

APPEARANCES:

FOR THE PLAINTIFFS: DORIS BESIKOF
1000 SO. BIRCH ST.
DENVER, CO 80222

FOR THE DEFENDANTS: JAMES E. HEISER
5334 SO. PRINCE ST.
4TH FLOOR
LITTLETON, CO 80166

ALSO PRESENT: DAVID RYAN
RUTH KIMMET
DIANE DENNISON

---

[3] This testimony was quoted and presented to the Magistrate, the District Court and the Court of Appeals for the Tenth Circuit in the body of motions and/or appended thereto.

COURT REPORTER: CHERI TYLER, C.S.R.
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CLARENCE KIMMET: HE SAYS, "WHEN YOU TELL ME THE TRUTH, YOU'LL GET YOUR DAUGHTER BACK." (P. 109, l. 20-21.)

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Case No. 86-K-778

CLARENCE KIMMET, RUTH KIMMET, and KARA KIMMET, an infant, by and through her parents and next friends, CLARENCE AND RUTH KIMMET,

Plaintiffs,

vs.

DAVID RYAN, DIANE DENNISON, and ARAPAHOE COUNTY DEPARTMENT OF SOCIAL SERVICES, a department of social services for the State of Colorado,

Defendants.

DEPOSITION OF RUTH KIMMET[4]

APPEARANCES:

FOR THE PLAINTIFFS: DORIS BESIKOF
1000 SO. BIRCH ST.
DENVER, CO 80222

FOR THE DEFENDANTS: JAMES E. HEISER
5334 SO. PRINCE ST.
4TH FLOOR
LITTLETON, CO 80166

ALSO PRESENT: DIANE M. DENISON
DAVID RYAN
CLARENCE KIMMET

---

[4] This testimony was quoted and presented to the Magistrate, the District Court and the Court of Appeals for the Tenth Circuit in the body of motions and/or appended thereto.

COURT REPORTER: CHERI TYLER, C.S.R.
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RUTH KIMMET: OUTSIDE THE COURTROOM WHEN THEY WERE TALKING, SOMEBODY SAID, "WE'RE GOING TO GET YOUR BABY ANYWAY." DIANE SAID TO ME, "IF YOU COOPERATE, WE'LL HAVE HER BACK IN A FEW WEEKS, OTHERWISE, IT COULD BE A YEAR." (P. 123, l. 6-9.)

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-1095
(D.C. No. 87-B-800)
(D. Colo)

CLARENCE KIMMET; KARA KIMMET, an infant by and through her father,

Plaintiffs-Appellants,

and

RUTH KIMMET,

Plaintiff,

v.

DAVID RYAN; DIANE DENNISON; and ARAPAHOE COUNTY DEPARTMENT OF SOCIAL SERVICES, a department of social services for the State of Colorado,

Defendants-Appellees.

ORDER AND JUDGMENT*
April 25, 1990

Before **BRORBY, EBEL,** Circuit Judges, and **JOHNSON****, District Judge

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**Honorable Alan B. Johnson, District Judge, United States District Court for the District of Wyoming, sitting by designation.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See, Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

This is an appeal from an order of the district court adopting the magistrate's recommendation and granting defendants' motion for summary judgment on the civil rights claims alleged in the complaint. We affirm.

On May 5, 1986, two month old plaintiff-appellant Kara Kimmet stopped breathing, her baby sitter called an

ambulance, and Kara was hospitalized on an emergency basis. Kara's diagnosis was retinal hemorrhages reflecting trauma, or "shaken baby syndrome." Her doctors notified defendants-appellees of the possibility of child abuse or neglect. Defendant-appellee David Ryan began a child abuse investigation. At the time of discharge from the hospital, Kara was placed in a foster home pursuant to a valid state court order. After approximately two months, Kara was returned to her parents, plaintiff Ruth Kimmet and plaintiff-appellant Clarence Kimmet.

In their complaint, plaintiffs alleged (1) defendants failed to properly investigate before taking custody of Kara, because there was no evidence the Kimmets were a danger to Kara and such action would be harmful to Kara, (2) Kara was poorly treated while in foster care, and (3) defendants were abusive to the Kimmets.

Additionally, plaintiffs contended defendants deprived them of their liberty interest and right to keep their family together, right to privacy, right to due process of law, right to freedom from malicious prosecution, summary judgment and abuse of process, and right to reputation.

The case was referred to the magistrate for disposition of plaintiffs' motion to strike two witnesses and for a recommendation after defendants filed a motion for summary judgment. The magistrate denied the motion to strike the witnesses. He determined the two witnesses, doctors who evaluated Kara, were not subject to the physician-patient privilege, because the privilege had been waived by statute, see Colo. Rev. Stat. § 19-10-112 (repealed on October 1, 1987, and recodified as Colo. Rev. Stat. § 19-3-311), and was not reinstated by the lawsuit. Additionally, the magistrate

concluded the doctors were fact witnesses, not experts. In considering defendants' motion for summary judgment, the magistrate recommended the motion be granted. After discussing Colorado law regarding child abuse or the dependency and neglect of a child, the magistrate determined the individual defendants' actions were protected by qualified immunity, if not by absolute immunity. The district court concluded the magistrate's recommendation was correct, approved the recommendation, and granted defendants' motion for summary judgment.

Before addressing the merits of this appeal, we must consider a jurisdictional issue, which was briefed by the parties at the court's direction. The parties were asked to brief whether the notice of appeal is affected by Torres v. Oakland Scavenger Co., 108 S. Ct. 2405 (1988). The caption of the notice of appeal states "Clarence

Kimmet, et al., Plaintiffs, v. David Ryan, et al., Defendants." The text of the body of the notice of appeal states, in part, "Notice is hereby given that the plaintiffs hereby appeal...."

Federal Rule of Appellate Procedure 3(c) requires that the notice of appeal specify the parties appealing. Torres, 108 S. Ct. at 2407 ("The failure to name a party in a notice of appeal is . . . a failure of that party to appeal."). The use of et al. is insufficient under Rule 3(c) to provide notice of the identity of the appellants. Id. at 2409. Stating "the plaintiffs appeal" is also insufficient to provide notice. Cf. Santos-Martinez v. Soto-Santiago, 863 F.2d 174, 176 (1st Cir. 1988) ("all plaintiffs appeal" insufficient under Torres).

Because Clarence Kimmet is specifically listed in the notice of appeal, this court has jurisdiction over

his appeal. See Johnson v. Trustees of the W. Conference of Teamsters Pension Trust Fund, 879 F.2d 651, 653 & n.1 (9th Cir. 1989) (only party actually named in notice of appeal is appellant when et al. is used). There is, however, no jurisdiction over Ruth Kimmet, because she is not specifically named in the notice of appeal. See Mariani-Giron v. Acevedo-Ruiz, 877 F.2d 1114, 1116 (1st Cir. 1989) (neither caption nor body of notice of appeal specified two of three parties); Meehan v. County of Los Angeles, 856 F.2d 102, 105 (9th Cir. 1988) (use of et al. after one parties' name was not sufficient to indicate intent to appeal by two others); cf. Pope v. Mississippi Real Estate Comm'n, 872 F.2d 127, 129 (5th Cir. 1989) (distinguishing Torres as referring to a large class of unnamed individuals as well as Torres, whereas in this case there were only two appellants

and et al. could only refer to unnamed appellant).

Even though Kara Kimmet was not specifically named as a party in the notice of appeal, we conclude we do have jurisdiction over her appeal. Her father and mother had initially sued in their individual and representative capacities. Thus, the concern in this case is not with the omission of a party from the notice of appeal, but with a party's failure to designate all of the capacities in which he brought suit. King v. Otasco, Inc., 861 F.2d 438, 443 (5th Cir. 1988). Because Kara was not suing as an independent party but instead was represented by her father, we have jurisdiction to review her claims. See id.

On appeal, appellants first argue the district court erred in granting summary judgment without considering the basis for their claims and without making de novo

findings. 28 U.S.C. § 636(b)(1)(B) requires a district court to review de novo a magistrate's findings to which there is objection. See United States v. Raddatz, 447 U.S. 667, 674-75 (1980); Gee v. Estes, 829 F.2d 1005, 1008 (10th Cir. 1987). Although the district court did not specifically address each of appellants' objections to the magistrate's recommendation, § 636(b)(1)(B) does not require it to do so. The district court stated it considered appellants' objections and approved the magistrate's recommendation. Such recitation was sufficient to satisfy § 636(b)(1)(B). Contrary to appellants' suggestion, the district court did not err by failing to hold a hearing.

Second, appellants argue the district court erred in granting summary judgment on the merits. In reviewing a summary judgment order, "the appellate court

applies the same standard employed by the trial court under Rule 56(c) of the Federal Rules of Civil Procedure." Osgood v. State Farm Mut. Auto. Ins. Co., 848 F.2d 141, 143 (10th Cir. 1988). Summary judgment may be entered when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Appellants specifically argue summary judgment was inappropriate and the individual appellees were not entitled to qualified immunity because (1) the Constitution guarantees, through rights of privacy, liberty, and due process, the sanctity of the family and (2) the right to be free from coercion, threats, and attempts to obtain a confession by separating Kara from her parents was established in May, 1986. Also, appellants argue the appellee county department of social services is liable for the actions

of the individual defendants due to an established departmental policy.

> The doctrine of qualified immunity provides that government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The plaintiff has the burden of proving that the law was "clearly established." Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988); see also Lutz v. Weld County School Dist., 784 F.2d 340, 342-43 (10th Cir. 1986). In order to satisfy this burden, the plaintiff may not merely identify in the abstract a clearly established right. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

Rozek v. Topolnicki, 865 F.2d 1154, 1157 (10th Cir. 1989).

Thus, "the relevant question in the present case is whether a reasonable social worker could have believed that

taking [Kara] and holding [her] in . . . custody was lawful 'in light of clearly established law and the information' the socialworkers' possessed." Baker v. Racansky, 887 F.2d 183, 187 (9th Cir. 1989) (quoting Anderson, 483 U.S. at 641). Other than indicating there is an interest in family relations, appellants failed to prove any clearly established law has been violated. Although there is a liberty interest in family relations protected by due process, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 842 (1977); Spielman v. Hildebrand, 873 F.2d 1377, 1383 (10th Cir. 1989), the interest is limited by the government's interest in protecting minors, especially where protection from parents may be necessary. Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir.), cert. denied, 484 U.S. 828 (1987). Under the circumstances of this case, we cannot

say the individual defendants violated clearly established law by any of their actions. See Baker, 887 F.2d at 185-90 (taking child into protective custody); Whitcomb v. Jefferson County Dep't of Social Servs., 685 F. Supp. 745, 748 (D. Colo. 1987) (with regard to claim of intimidation, court failed to find any allegations of fact suggesting defendants prevented plaintiffs from exercising their constitutional rights). The district court correctly concluded the individual appellees are entitled to qualified immunity. See Watson v. City of Kan. City, 857 F.2d 690, 694 (10th Cir. 1988) (presence of fact disputes precludes granting summary judgment only if disputes are genuine and concern material facts).

Appellants' arguments with regard to the appellee county department of social services are likewise without merit. Although the magistrate and district court

did not make findings in this regard, appellants failed to prove any established policy or custom for threatening or coercing them or violating their constitutional rights. See Lux ex rel. Lux v. Hansen, 886 F.2d 1064, 1067 (8th Cir. 1989). We conclude the district court correctly granted summary judgment for appellees.

Appellants' final argument on appeal is that the district court erred in holding that the waiver of the medical privilege in the juvenile proceedings continued to this case thereby allowing appellees' attorney ex parte contact with the doctors. "The privileged communication between patient and physician . . . shall not be a ground for excluding evidence in any judicial proceeding resulting from a report pursuant to this article." Colo. Rev. Stat. § 19-10-112 (repealed on October 1,

1987, and recodified as Colo. Rev. Stat. § 19-3-311) (emphasis added). Accordingly, we conclude this argument is without merit.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-B-800

CLARENCE KIMMET, et al.,)
)
Plaintiffs,)
)
v.)
)
DAVID RYAN, et al.,)
)
Defendants.)

ORDER
March 16, 1989

On March 15, 1989, this court entered its order approving the magistrate's recommendation ordering that defendant's Motion for Summary Judgment be granted and that defendants be awarded attorney fees and costs in this action.

On March 15, 1989, plaintiffs filed their "Motion to Accept Filing of More Than 10 Pages Pursuant to Local Rules," together with their proposed "Plaintiffs'

Specific Objections to Recommendation of United States Magistrate."

It appears that this court's order of March 15, 1989, was premature and that plaintiffs filing of objections is timely. See Fed. R. Civ. P. 6; Local Rule 603. Accordingly, the court accepts for filing "Plaintiffs' Specific Objections to Recommendation of United States Magistrate" in excess of 10 pages and considers the same. Having considered plaintiffs' objections to the recommendation of the magistrate, and now being duly advised

IT IS ORDERED as follows:

1. This court's order entered March 15, 1989 is set aside.

2. Plaintiffs' Motion to Accept Filing of More Than 10 pages Pursuant to Local Rules is GRANTED and the plaintiffs' objections are accepted.

3. Having accepted and considered plaintiffs' objections, the court concludes that they are not well taken and that the recommendation of the magistrate is correct and should be approved.

4. Defendant's Motion for Summary Judgment is GRANTED.

5. Defendants have to and including Tuesday, March 28, 1989 to submit their bill of costs, and affidavit for attorney fees reasonably expended in the defense of this action. The plaintiff and plaintiffs' counsel shall have to and including April 11, 1989 to file specific written objection thereto.

DATED. March 16, 1989.

BY THE COURT:

Lewis T. Babcock, Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-B-800

CLARENCE KIMMETT, et al.,)
)
Plaintiffs,)
)
v.)
)
DAVID RYAN, et al.,)
)
Defendants.)

RECOMMENDATION OF
UNITED STATES MAGISTRATE
March 1, 1989

Plaintiffs, Clarence Kimmett, Ruth Kimmett and Kara Kimmett, an infant, by and through her parents and next friends, Clarence and Ruth Kimmett, have filed a Complaint pursuant to 42 U.S.C. § 1983 against David Ryan, Diane Dennison and the Arapahoe County Department of Social Services. The Defendants have filed a Motion for Summary Judgment pursuant to Rule 56 Fed.R.Civ.P. The Motion has been

assigned to Magistrate Donald E. Abram pursuant to Rule 603 of the Local Rules of Practice of the United States District Court for the District of Colorado. The Magistrate has reviewed the motion and the briefs and is of the opinion that oral argument would be of no assistance in ruling on the Motion.

FACTS

The verified Complaint filed by the Plaintiffs alleges the following facts. On May 5th, 1986 Plaintiff Kara Kimmett was hospitalized on an emergency basis by Kara's babysitter because Kara had stopped breathing while in the sitter's care. Subsequent to this hospitalization and allegedly "long after any time of emergency," the Defendants took custody of Kara allegedly without adequate investigation and in spite of evidence that there was no danger to Kara from her parents. The Complaint further alleges

that Kara was removed from her home for approximately two months during which time she was in the care of a foster mother who took Kara on a mountain camping trip and treated her health problems in a cavalier fashion. Plaintiffs claim that during this time Defendants engaged in an abusive course of conduct toward the Plaintiffs by imposing demands on the Plaintiffs, threatening and coercing Plaintiffs with pending legal action and by meddling and intruding in the Plaintiffs' daily lives. Plaintiffs also allege that the Defendants accused Clarence Kimmett of being a convicted child abuser while failing to check court records which showed that Clarence Kimmett had been exonerated of any alleged child abuse.

Plaintiffs allege that the Defendants' actions deprived the Plaintiffs of the following rights: liberty interest and the right to keep their family together; right

to privacy; right to due process of law; freedom from summary judgment, abuse of process, and malicious prosecution; and right to reputation.

An examination of the affidavits and exhibits filed with Defendants' Motion for Summary Judgment and Plaintiffs' response to that Motion provides additional facts regarding Plaintiffs' allegations. That examination indicates that just prior to Kara's hospitalization Kara had been at her babysitter's, Patricia Hammet, when Hammet noticed Kara was having difficulties breathing and appeared very limp. Hammet had Kara transported to the emergency room of Aurora Humana Hospital. After various tests were performed on Kara by Dr. James W. McKowan, it was determined that Kara's problems were probably caused by non-accidental trauma or "shaken baby syndrome." Given this determination, Dr. McKowan notified Defendant David Ryan

of the Arapahoe County Department of Social Services to address potential child abuse or neglect.

Kara was subsequently transferred to the intensive care unit of Porter Memorial Hospital. Dr. Stephen F. Conner was one of Kara's treating physicians at Porter. He also determined that Kara had most likely suffered from shaken baby syndrome. Therefore, Dr. Conner also made a referral to Social Services.

In response to the referrals of Dr. McKowan and Dr. Conner, Defendant Ryan commenced an investigation into the cause of Kara's injuries. This investigation included speaking with Dr. McKowan, Patricia Hammet, Ruth and Clarence Kimmett, Dr. Hendrika Cantwell, a Denver Department of Social Services physician, Sylvia Rogers, a Porter Memorial Hospital social worker, Mindy Mandell, a Porter Memorial Hospital child health associate, Frances

Kimmett, Kara's grandmother, Christopher Kimmet, Kara's stepbrother, and Dr. Frank Martorano, one of Kara's doctors at Porter Memorial. Based upon this preliminary investigation, on May 8, 1986 Ryan sought and obtained a court order granting temporary custody of Kara to the Arapahoe County Department of Social Services. On the following day, Wadine Gehrke was appointed as guardian ad litem for Kara. Gehrke represented Kara at the detention hearing and all subsequent hearings in the case. Kara was eventually released from the hospital to the custody of a foster mother. Further court hearings were held and after about two months Kara was returned to the custody of her parents.

SUMMARY JUDGMENT

Defendants now move for summary judgment pursuant to Rule 56, Fed.R.Civ.P., arguing that they are entitled to qualified

immunity. Rule 56 of the Federal Rules of Civil Procedure provides that

> summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c). Consistent with the material fact requirement of Rule 56, the existence of factual disputes which are immaterial to the issues in the case are of no consequence. Only genuine issues of material fact, determined by reference to the substantive law, can preclude entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). In determining whether a movant for summary judgment has satisfied the burden imposed by Rule 56, all reasonable inferences must be construed in favor of the non-moving

judgment, the Plaintiffs again never cite or refer to the Constitution of the United States. The issues of right to privacy, right to due process of law, freedom from summary judgment, abuse of process, malicious prosecution and the right to reputation are never addressed in the brief. There is no case law cited.

The Plaintiffs' sole support of the law is a conclusory statement set forth at page 5 of the brief which is as follows:

> In 1986, the liberty interest in keeping parents and children together; the rights of substantive and procedural due process and the right to be free from misuse and abuse of our legal system were so long settled and so well-known, that not only reasonable social workers, but any reasonable citizen would have known that the Defendants conduct in this matter was wrong.

The total lack of case law or reference to the Constitution of the United States leaves the court with only speculation as

party. Otteson v. United States, 622 F.2d 516, 619 (10th Cir. 1980).

PLAINTIFFS' CLAIMS

The Plaintiffs in the Complaint at no time set forth a specific Federal Constitutional right in the pleading. In fact the Constitution is never mentioned or cited in the Complaint. After setting forth a litany of conclusory allegations, the Complaint states:

> 11. By the actions above, Defendants deprived the plaintiff of the following clearly established and well-settled Constitutional rights.
>
> a. Liberty interest and right to keep their family together
>
> b. Right to privacy
>
> c. Right to due process
>
> d. Freedom from summary judgment, abuse of process and malicious prosecution
>
> e. Right to reputation

In the brief of the Plaintiffs in opposition to the motion for summary

to the Constitutional claims. Certainly if the law is "well-known" then the Plaintiff could at least have provided the court with the law.

COLORADO LAW

The legislature of the State of Colorado has had established procedures set up under the Colorado Children's Code for court intervention where there is suspected child abuse or the dependency and neglect of a child. The legislature in 1975 added to the Children's Code the "Child Protection Act of 1975", C.R.S. § 19-10-101 et seq. Section 19-10-109(4)(a) places the duty of investigating the suspected child abuse in the county department of social services. A medical doctor after diagnosing a non-accidental injury such as Kara Kimmett's is required by law to report the suspected child abuse injury to the department of social services. § 19-10-104. Section

19-10-107 and 116 provide for an emergency order by a judge removing the child temporarily from the custody of parents until a petition for dependency and neglect can be filed with the court. A hearing must be held within 72 hours by the court to determine whether a temporary placement out of the home is necessary. § 19-10-107. The parents are entitled to appointment of counsel pursuant to § 19-1-106. According to the Plaintiffs' brief and depositions attached to the brief they were represented by an attorney, Nancy Hutchinson. Nancy Hutchinson testified in her deposition that her clients, Mr. and Mrs. Kimmett, agreed to the custody being placed temporarily in the department of social services at the May 20, 1986 court hearing.

It is the court, not the department of social services that makes the determination whether the child should

be temporarily placed outside of the home to ensure the minor child's safety and welfare. W.H. v. Juvenile Court, 735 P.2d 191, 193 (Colo. 1987). After the court has entered a temporary order placing the child out of the home, the department of social services does not have the authority to dismiss the dependency petition or to return the child to the parents without court approval. As stated in People in the Interest of R.E., 729 P.2d 1032, 1034 (Colo.App. 1986), if there is an objection to the dismissal by the guardian ad litem for the minor child, the court must hold a hearing and determine by the preponderance of the evidence whether the child is neglected. The feelings and beliefs of the Defendant social workers as to whether the child should or should not have been returned to the home would not control the actual placement of the child back with the Kimmetts. Once the court

took jurisdiction, the Defendants had no authority to return the child contrary to the court's orders placing the custody in the department of social services. Myers v. Morris, 810 F.2d 1437, 1468 (8th Cir. 1987). After the court order of May 20, 1986 placing the child out of the home and in the care of the department of social services, the Kimmetts through their counsel always had the right to request a periodic review by the court of the placement outside of the home. People in the Interest of P.L.B., 743 P.2d 980, 982 (Colo.App. 1987); § 19-3-109(4). There has been no evidence presented that they made such a request through their attorney. What is clear, the statutes of the State of Colorado provide a due process procedure where the Plaintiffs could have objected to the placement of the child outside of the home and required a hearing before the court. After

discussing the matter with their counsel, they did not pursue that due process right.

ABSOLUTE AND QUALIFIED IMMUNITY

What is clear by the affidavits and excerpts of depositions presented by both the Plaintiffs and Defendants in their briefs is that the Defendant social workers followed the procedure as set forth by the Child Protection Act of 1975. It requires an act of discretion by the department of social services' case worker immediately upon a report of child abuse. Here, two medical doctors both made the diagnosis that the child suffered from a shaken child syndrome. There was brain injury. The extent of that injury could only be determined after a period of time of hospitalization. The cause of the injury could not be determined without a full investigation which would take a period of time.

Based upon that discretionary function, the Defendants have raised the defense of qualified immunity. "When the affirmative defense of qualified immunity is properly raised, the plaintiff has the burden of convincing the court that his asserted federal Constitutional or statutory rights were clearly established at the time of the conduct at issue." Whitcomb v. Jefferson County Department of Social Services, 685 F.Supp. 745, 747 (D. Colo. 1987); Lutz v. Weld County School District No.6, 784 F.2d 340, 342-43 (10th Cir. 1986). "In deciding whether the law that the defendant allegedly violated was clearly established, the court will examine the law as it was at the time of the defendants action." Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988). The Plaintiff in meeting that burden must do more than simply identify in the abstract

a clearly established right that the individual defendants have violated and the right must be so sufficiently clear that a reasonable person would understand that what he is doing will violate that right. Pueblo Neighborhood Health Center, supra, at 645. There also must be some factual relationship with the right that is being violated in relationship to the case law that establishes the right. Eastwood v. Department of Corrections, 846 F.2d 627, 630 (10th Cir. 1988).

The Plaintiffs' reliance upon a general statement of law in Santosky v. Kramer, 455 U.S. 745 (1981), is taken out of context and does not meet the burden of law. Santosky recognizes the state's parens patriae responsibility in preserving the welfare of the child. p. 766-767. The issue in Santosky is whether due process requires a higher standard of proof in terminating the

parents right to the child. The Court held that the evidence must be by a clear and convincing evidence standard. p. 768-69. Plaintiffs have cited three other cases which have no factual relevance or legal relevance to this case. In Malley v. Briggs, 106 S.Ct. 1092 (1986), the Court sets forth the standard of qualified immunity when a police officer relies upon the execution of a search warrant. Daniels v. Williams, 106 S.Ct. 662 (1986), establishes that prison officials cannot be sued for negligent injuries caused to inmates pursuant to 42 U.S.C. § 1983. The Lutz v. Weld County School District, 784 F.2d 340 (10th Cir. 1986), case involves the qualified immunity of school administrators in discharging handicapped school teachers. The social workers could not reasonably believe that any of the cases cited established a constitutional right of the Plaintiffs to the child in

light of the suspected child abuse diagnosed by the medical doctors. In fact, case law places the social worker in the position of possibly being sued pursuant to 42 U.S.C. §1983 if the child was not removed from the home and suffered an injury. See Estate of Bailey by Oare v. County of York, 768 F.2d 503, 510-11 (3rd Cir. 1985). Contra DeShaney v. Winnebago County Dept. of Social Services, 812 F.2d 298, 302-304 (7th Cir. 1987) aff'd, ___ U.S. ___ (Feb. 22, 1989)(1989 U.S. Lexis 1039).

Judge Jim R. Carrigan addressed a lawsuit very similar to the instant one in the Whitcomb case. Amidst a discussion of "clearly established rights" the court stated:

> Undoubtedly, the privacy and autonomy of familial relationships is among the interests protected by the Fourteenth Amendment. However, the interest of the overall family is counterbalanced by

> interest of a child within that family in freedom from abuse and by the government's interest in protecting powerless children who may be subjected to abuse. Moreover, the immediate removal of a child, without parental consent, or without a prior notice and court order, is permissible when there is a substantiated indication that the child's safety is threatened. Thus, the interest in keeping the family unit intact does not eclipse the public interest when child abuse is suspected, and whether plaintiffs' constitutional rights were violated in a particular case would depend on a balancing of these two conflicting interests.

Whitcomb, 685 F.Supp. at 747 (citations omitted).

Judge Carrigan also stated that "where the outcome of a case depends on balancing of competing interests, the law's application is so fact dependant that the law can rarely be clearly established." And that "wherever a balancing of interest is required, the facts of the existing case law must

closely correspond to the contested action before the defendant official is subject to liability." Whitcomb, 685 F.Supp. at 747 (citations omitted).

If the Plaintiffs had researched the law, they would have found that the case law in all circuits have held that social workers or law enforcement officers who remove children from the home temporarily because of suspected child abuse are protected by either absolute immunity or by qualified immunity. In all cases, the courts have held that the law as to the constitutional right of a parent is not clearly established as to a social worker making the discretionary decision as to whether to remove a child from the home where there is suspected child abuse.

The cases holding that there is absolute immunity are as follows: Meyers v. Contra Costa County Department of Social Services, 812 F.2d 1154, 1157 (9th

Cir. 1986); Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984); Ward v. San Diego Department of Social Services, 691 F.Supp. 238, 240-41 (S.D. Calif. 1988); Mazor v. Shelton, 637 F.Supp. 330 (N.D. Calif. 1986); Hennessey v. Washington Department of Social Services, 627 F.Supp. 137 (E.D. Wash. 1985); Pepper v. Alexander, 599 F.Supp. 523, 526-27 (D. N.M. 1984); Whelehan v. County of Monroe, 558 F.Supp. 1093, 1098-99 (W.D. NY 1983). The cases holding that there is qualified immunity are as follows: Doe v. Hennipin County, 558 F.2d 1325, 1328-29 (8th Cir. 1988); Hodorowski v. Ray, 844 F.2d 1210, 1216-1217 (5th Cir. 1988); Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987); Whitcomb v. Jefferson County Department of Social Services, 685 F.Supp. 745, 747-78 (D. Colo. 1987).

The Magistrate finds that the Defendants are protected by qualified

immunity if not absolute immunity based upon the affidavits and depositions submitted by both Plaintiff and defense counsel.

RULE 11

The Plaintiff's Complaint does not set forth any Constitutional claim. As previously indicated, no Constitutional case law has been submitted nor has the Plaintiff at any time specifically set forth any reference to the Constitution of the United States. Even in the brief the court is left with only speculation as to what the Plaintiffs' Constitutional claims are. If the Plaintiffs had done their research, there was ample law establishing clearly the right of qualified and absolute immunity on the part of the social workers. The Magistrate has not found any cases that do not find qualified immunity under the fact situation before this court.

Judges of this court have not been hesitant in using the penalties set forth in Rule 11, F.R.Civ.P. where counsel have failed to have a factual or a legal basis for a claim filed in this court. See Colorado Chiropractic Counsel v. Porter Memorial Hospital, 650 F.Supp. 231 (D. Colo. 1987)(Finesilver); Slane v. Rio Grande Water Conservation District, 115 F.R.D. 61 (D. Colo. 1987)(Matsch); Hedahal v. Gilpin County Department of Social Services, 699 F.Supp. 846 (D. Colo. 1988)(Carrigan); Storage Technology Partners v. Storage Technology Corporation, 117 F.R.D. 675 (D. Colo. 1987)(Kane); Rice v. Hamilton Oil Corp., 658 F.Supp. 446 (D. Colo. 1987)(Weinshienk).

Judge Kane, in his Orders of June 5, 1987 and October 15, 1987, warned the Plaintiffs that attorney's fees could be awarded and asked counsel to reconsider

their cases in light of the facts and rulings in the other department of social services cases. Plaintiffs did not do so. They have provided no law to support the allegations in the Complaint and have totally ignored the well established law that the Defendants were cloaked with either absolute immunity or qualified immunity. In Hedahal v. Gilpin County Department of Social Services, supra, Judge Carrigan found that the plaintiffs' counsel acted "unreasonably and vexatiously" in permitting the plaintiffs to pursue a claim against the Colorado Department of Social Services when the law was well established that the Colorado Department of Social services had Eleventh Amendment immunity. Here, counsel failed to set forth any specific Federal Constitutional grounds in the Complaint and after the filing of the motion for summary judgment has still failed to

provide the court with any legal or factual grounds to support the allegations of the Complaint. Further, the Plaintiffs have totally ignored the overwhelming case law granting the Defendants qualified immunity under similar facts of this case. Pursuant to Rule 11, I find that the Plaintiffs and their attorney should pay the Defendants' fees and costs.

Accordingly, the Plaintiffs have failed to meet their burden of convincing this court that the law was clearly established and that it prohibited the Defendants' conduct in this case. Therefore,

IT IS RECOMMENDED that Defendants' Motion for Summary Judgment be granted.

FURTHER, IT IS ORDERED that pursuant to Rule 603 of the Local Rules of Practice of the United States District Court for the District of Colorado, the

parties herein shall have ten (10) days after service hereof to serve and file written, specific objections hereto. If no such objections are timely filed, the Magistrate's proposed findings and recommendations may be accepted by the District Judge and appropriate orders entered without further notice.

Dated at Denver, Colorado this 1st day of March, 1989.

BY THE COURT:

D.E. Abram
United States Magistrate

APPENDIX H

AMENDMENT XIV

SECTION I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

42 U.S.C 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title, "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United

States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 USC 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USC 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX J

RULE 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the

hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence,

and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable

attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(2)

No. 90-413

In The

Supreme Court of the United States

October Term, 1990

CLARENCE KIMMET AND KARA KIMMET, an infant, by and through her parent and next friend, Clarence Kimmet,

Petitioners,

and

RUTH KIMMET,

Plaintiff,

v.

DAVID RYAN, DIANE DENNISON; and ARAPAHOE COUNTY DEPARTMENT SOCIAL SERVICES, a department of social services for the State of Colorado,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JAMES E. HEISER
5445 DTC Parkway
Penthouse Four
Englewood, Colorado 80111
(303) 773-6160

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether in 1986 the law was clearly established that it was a federal civil rights violation for a social worker to demand a confession to child abuse in exchange for returning a two-month old nursing infant to her parents?

2. Whether in 1986 the law was clearly established that it was a federal civil rights violation for a social worker to accurately advise the parents of the statistical length of separation in dependency and neglect proceedings, if a petition for dependency and neglect were sustained?

3. Whether in 1986 the law was clearly established that it was a federal civil rights violation for a social worker to threaten an attorney in a dependency and neglect action with a dependency and neglect action against that attorney, when there was no showing that the attorney's representation of her client was in any way affected?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

The relevant facts are set forth in the Recommendation of the Magistrate.[1] These facts show that in May 1986 Kara Kimmet, age 2 months, was at her babysitter's, Patricia Hammet, when Hammet noticed Kara was having difficulties breathing and appeared very limp. Paramedics were called who transported Kara to the emergency room of Aurora Humana Hospital. After various tests were performed on Kara by Dr. James W. McCowan, it was determined that Kara's problems were probably caused by non-accidental trauma or "shaken baby syndrome". Given this determination, Dr. McCowan notified Defendant David Ryan of the Arapahoe County Department of Social Services to address potential child abuse or neglect. Kara was subsequently transferred to the intensive care unit of Porter Memorial Hospital in Denver, Colorado. Dr. Steven F. Conner was one of Kara's treating physicians at Porter. He also determined that Kara had most likely suffered from "shaken baby syndrome." Therefore, Dr. Conner also made a referral to social services.

In response to the referrals of Dr. McCowan and Dr. Connor, Defendant Ryan commenced an investigation into the cause of Kara's injuries. This investigation included speaking with Dr. McCowan, Patricia Hammet, Ruth and Clarence Kimmet, Dr. Henrika Cantwell, a Denver Department of Social Services physician, Sylvia

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[1] An incomplete copy is included in the Appendix to the Petition for Writ of Certiorari at Appendix B. For clarity's sake, a more complete copy is attached to this Opposition as Appendix A.

Rogers, a Porter Memorial Hospital social worker, Mindy Mandell, a Porter Memorial Hospital child health associate, Francis Kimmet, Kara's grandmother, Christopher Kimmet, Kara's stepbrother, and Dr. Frank Matorano, one of Kara's doctors at Porter Memorial. Based upon this preliminary investigation, on May 8, 1986, Ryan sought and obtained a court order granting temporary custody of Kara to the Arapahoe County Department of Social Services. On the following day, Wadine Gehrke was appointed as guardian *ad litem* for Kara. Gehrke represented Kara at the detention hearing and all subsequent hearings in the case. Kara was eventually released from the hospital to the custody of a foster mother. Further court hearings were held and after about two months Kara was returned to the custody of her parents.

As noted in the Magistrate's Recommendation, Colorado has established due process procedures for court intervention when there is suspected child abuse or the dependency and neglect of a child. Section 19-10-109(4a), C.R.S. placed the duty of investigating suspected child abuse on the County Department of Social Services. Medical doctors, after diagnosing a non-accidental injury such as Kara Kimmet's, are required by law to report the suspected child abuse injury to the Department of Social Services. Section 19-10-104, C.R.S. Section 19-10-107 and 116, C.R.S. provide for an emergency order by a judge removing the child temporarily from the custody of parents until a petition for dependency and neglect can be filed with the court. A hearing must be held within seventy-two hours by the court to determine whether a temporary placement out of the home is necessary, Section 19-10-107, C.R.S. Parents are entitled to appointment

of counsel pursuant to 19-1-106, C.R.S. This hearing is referred to as a detention hearing. At this hearing the Kimmets were represented by an attorney, Nancy Hutchinson.

The alleged threats "that if you only confess we'll return the child to you" (Appendices B, C and D to the Petition for Certiorari) and the alleged threat to increase the time that the child would be separated from the parents if the parents opposed Social Services' position in juvenile court proceedings were made in a settlement meeting prior to the detention hearing in the presence of the parents' attorney, the guardian *ad litem* Wadine Gehrke, both social workers, and the attorney for the Department of Social Services, Susan Broyles Layton. See Appendix B, Petition for Certiorari.[2]

The (juvenile) court, and not the Department of Social Services, makes the determination whether the child should be temporarily placed outside the home to insure that minor child's safety and welfare. *W.H. v. Juvenile Court*, 735 P.2d 191, 193 (Colo. 1987). After the

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[2] By referencing the alleged testimony, Respondents are not agreeing that any threat was made. In fact, the Affidavit of Wadine Gehrke attached as Exhibit C to the Motion for Summary Judgment indicated that the Department of Social Services treated the Kimmets in a humane and sensitive manner, that the actions of the Department of Social Services were reasonable, in good faith, and involved a balancing of interests of the parents and family in staying together against protecting a two month old child from additional harm. See Exhibit C, paragraphs 7 through 11. However, since the case was decided on a motion for summary judgment, for purposes of this discussion, it must be assumed that the allegations of fact are true.

court has entered a temporary order placing the child out of the home, the Department of Social Services does not have the authority to dismiss the dependency petition or to return the child to the parents without court approval. The feelings and beliefs of the Respondent social workers as to whether the child should or should not have been returned to the home would not control placement of the child back to the Kimmets. Once the court took jurisdiction, the Respondents had no authority to return the child contrary to the court's orders placing the custody in the department of social services. *Myers v. Morris*, 810 P.2d 1437, 1468 (8th Cir. 1987). After the court order of May 20, 1986 placing the child out of the home and in the care of the Department of Social Services, the Kimmets through their counsel always had the right to request a periodic review by the court of the placement outside of the home. *People in the Interest of P.L.B.*, 743 P.2d 980, 982 (Colo. App. 1987); Section 19-3-109(4) C.R.S. No evidence was presented that they made such a request through their attorney. The statutes of the State of Colorado provide a due process procedure where the Kimmets could have objected to the placement outside of the home and required a hearing before the court. After discussing the matter with their counsel, they did not pursue that due process right. Magistrate's Recommendation, Appendix A at App. 6 to 8.

REASONS FOR DENYING THE WRIT

Petitioners state that the questions submitted in the Petition are of special importance "because abuses of power and infringements upon individual rights, beyond

what is necessary to protect children occur; when social workers exercise unbridled power. The doctrine of qualified immunity has been improperly applied to immunize violative conduct by social workers in the case."

As noted in the Statement of the Case, social workers under Colorado law never exercise unbridled power and did not do so in this case. It was the Court, and not the social workers who made the determination to remove the child from her home while the investigation proceeded.

Petitioners had a due process right to request a hearing to challenge that decision. Even after the alleged threats were made in the settlement meeting, Petitioners still had that right, had the opportunity to discuss the matter with their attorney and decided not to exercise that due process right. Under Colorado law, to establish duress as grounds for avoidance of a contract or other act, exertion of pressure by threats is not enough but it must be shown that the threats employed "actually subjugate the mind and will of the person against whom they were directed and were thus the sole and efficient cause of the action which he took." *Weisen v. Short*, 43 Colo. App. 374, 604 P.2d 1191, 1192 (Colo. App. 1979). That case further held that when the person had the opportunity to discuss the matter with a lawyer, had the benefit of his advice, there was insufficient evidence of duress so as to void the contract. Here the alleged comments were made by an adversary in a settlement meeting in the presence of their attorney. The Plaintiffs did have the opportunity to confer with their counsel, who apparently concluded as a tactical matter that the hearing should be waived as a

method of resolving the whole case. See Deposition of Nancy Hutchinson, pages 37 to 38, attached hereto as Appendix B at App. 16 to 18.

As she has done below, Petitioners' counsel attempts to show that the law was "clearly established" in the *Harlow* sense by quoting cases out of context. See *e.g. Santosky v. Kramer,* 103 S.Ct. 1388, 1394-95 (1982) cited at page 8 of the Petition and referred to below in the Magistrate's Recommendation at page 8 as "taken out of context and does not meet the burden of law." Plaintiff's counsel totally ignores the requirement set forth in *Meyers v. Morris,* 810 F.2d 1437 at 1462 - 1463 (8th Cir. 1987) that there must be close correspondence between the facts of the challenged action and a reported case of violation of constitutional rights. See also, *Whitcomb v. Jefferson County Department of Social Services,* 685 F.Supp. 745, 747 (D. Colo. 1987).

Petitioners make no attempt to furnish such as precedent and have conceded below that there is no such similar precedent, indeed that this case is "unique."

The Petition states that the Tenth Circuit has decided an important question of federal law in violation of Fourteenth Amendment rights in a way that conflicts with applicable decisions of this Court, the Constitution and 42 U.S.C. 1983, citing *Lynumn v. State of Illinois,* 372 U.S. 917 (1963). That was a criminal case, not a civil case, did not involve a social worker, but a law enforcement agent, and as stated by Petitioner "holds that coercion of a confession from a mother of young children is a violation of the due process clause of the Fourteenth Amendment." However, it is undisputed here that despite the alleged

demands for a confession, the parents never did confess. Therefore this case does not show that the law was "clearly established" as to the actions of the social workers alleged in this case.

Petitioners argue that another criminal case *U.S. v. Tingle*, 658 F.2d 1332 (9th Cir. 1981) decided by another circuit court, conflicts with the decision in this case. In that case, the Court held that the Defendant was deprived of due process of law because of a conviction obtained based in part upon an involuntary confession. In a footnote at 658 F.2d 1336, fn. 3, the Court expressly refused to decide whether it was proper to inform a Defendant of the maximum statutory penalties for the offenses of which he was suspected, noting that the Fifth Circuit has approved "telling the appellant in a non-coercive manner of reasonably expected penalties" citing *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978), where the detaining officer described both a fifteen year maximum penalty and the five to seven year penalty normally imposed.

The case presented here is readily distinguishable from *Tingle*. Not only is this a civil, not a criminal case; involves a social worker, not a law enforcement agent; but principally in the fact as described *supra*, that despite the alleged coercion that if the Petitioners would only confess, the child would be returned to them, the Petitioners never did confess. Also, there has been no showing that the comment made by Defendant, Diane Dennison, "You know, statistically, if the children are placed in foster care, they're there for up to a year or more," as quoted in Nancy Hutchinson's deposition was an inaccurate statement. Indeed Ms. Hutchinson testified

at page 38 of her deposition, that anywhere from six months to two years was average. See Appendix B; *United States v. Ballard, supra.*

The third case cited by Petitioners, was *Rex v. Teeples,* 753 F.2d 841, 843 (10th Cir. 1985), as allegedly holding that "the use of coercion and physical detention in order to obtain a confession were held to be in violation of constitutional rights actionable under Section 1983. That case is not only not factually analogous to the case at bar, but properly understood, supports Respondents' position. This case involved an alleged conspiracy between a Loveland, Colorado police officer (Teeples), a deputy district attorney and a doctor to place Rex in a 72 hour mental health hold, during which they coerced a involuntary confession from him. Obviously, this case does not aid the Petitioners, as they concede that no confession was ever extracted from them. They seek to bolster their argument by combining it with the fact that Kara was detained, amounts to a due process violation. However, the court in *Teeples* expressly noted at 752 F.2d 842, that if there was probable cause for the detention, there was no due process violation. As noted by the Magistrate in the case at bar, once the social workers, upon probable cause, obtain a temporary order placing the child out of the home, the Department of Social Services does not have the authority to dismiss the dependency petition or return the child to the parents without court approval. See Appendix A, Magistrate's Recommendation at App. 7. The Magistrate expressly found and the District Court affirmed, that the statutes of the State of Colorado provide a due process procedure where the Petitioners could have objected to the placement of the child outside their

home and required a hearing, but after discussing the matter with counsel, they did not pursue that due process right.

The alleged threat against Petitioners' second counsel has not been shown to have affected the Kimmets' representation in any way. By that point, the court had already assumed jurisdiction over the child, the temporary detention hearing on May 20, 1986 had been held and there was no evidence that, as a result of the threats, that attorney's legal representation was affected.

In the case of *U.S. v. Irwin*, 612 F.2d 1182 (9th Cir. 1980) an undercover Drug Enforcement Administration agent allegedly interfered with the defendant's Sixth Amendment right to counsel and Fifth Amendment rights to due process and protection from self-incrimination by importuning the defendant to ignore the advice of his attorney that he not talk to or actively work with the police or government agents, and the agent urged the defendant to resume his activities as a governmental informant. The Court, after discussing a series of other cases, held that mere government intrusion into the attorney/client relationship, though not condoned, is not of itself violative of the Sixth Amendment right to counsel or Fifth Amendment right to due process, unless the intrusion substantially prejudices the Defendant. This prejudice can arise when evidence gained through the interference is used against the Defendant at trial, the prosecution uses confidential defense plans and strategy, or from government influence which destroys Defendant's confidence in his attorney and from other actions designed to give the prosecution an unfair advantage.

The court in *Irwin* denied the motion to dismiss the indictment, but did suppress incriminating statements made to the agent. The conduct described in *Irwin* is far more egregious than that involved here, and even in that criminal case, with the high sensitivity to the rights of defendants necessarily attendant on conviction, the court refused to find a violation of either the Sixth Amendment right to counsel or the Fifth Amendment right to due process. In the case at bar, there is no evidence of prejudice to Plaintiffs whatsoever from the alleged threat made against their second attorney. Therefore, the Petitioners' claim of denial of substantive due process based upon threats against Ms. Gleason must fail.

This Court should decline to issue the Writ of Certiorari prayed for. In addition to the *per curiam* nature and non-precedential value of the Court of Appeals' opinion, Petitioners have not shown that their factual premises are accurate, or that the law was "clearly established" by a close correspondence between the facts of prior reported cases and the facts of the case at bar. Therefore, none of the considerations governing review on Certiorari under Rule 17 of this Court exist.

CONCLUSION

For the reasons stated above, Respondents request that the Petition be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-B-800

CLARENCE KIMMETT, et al.,

Plaintiff,

vs.

DAVID RYAN, et al.,

Defendants.

FILED MAR 1 1989

RECOMMENDATION OF
UNITED STATES MAGISTRATE

Plaintiffs, Clarence Kimmett, Ruth Kimmett and Kara Kimmett, and infant, by and through her parents and next friends, Clarence and Ruth Kimmett, have filed a Complaint pursuant to 42 U.S.C. § 1983 against David Ryan, Diana Dennison and the Arapahoe County Department of Social Services. The Defendants have filed a Motion for Summary Judgment pursuant to Rule 56 Fed.R.Civ.P. The Motion has been assigned to Magistrate Donald E. Abram pursuant to Rule 603 of the Local Rules of Practice of the United States District Court for the District of Colorado. The Magistrate has reviewed the motion and the briefs and is of the opinion that oral argument would be of no assistance in ruling on the Motion.

FACTS

The verified Complaint filed by the Plaintiffs alleges the following facts. On May 5th, 1986 Plaintiff Kara Kimmett was hospitalized on an emergency basis by Kara's babysitter because Kara had stopped breathing while in the sitter's care. Subsequent to this hospitalization and allegedly "long after any time of emergency," the Defendants took custody of Kara allegedly without adequate investigation and in spite of evidence that there was no danger to Kara from her parents. The Complaint further alleges that Kara was removed from her home for approximately two months during which time she was in the care of a foster mother who took Kara on a mountain camping trip and treated her health problems in a cavalier fashion. Plaintiffs claim that during this time Defendants engaged in an abusive course of conduct toward the Plaintiffs by imposing demands on the Plaintiffs, threatening and coercing Plaintiffs with pending legal action and by meddling and intruding in the Plaintiffs' daily lives. Plaintiffs also allege that the Defendants accused Clarence Kimmett of being a convicted child abuser while failing to check court records which showed that Clarence Kimmett had been exonerated of any alleged child abuse.

Plaintiffs allege that the Defendants' actions deprived the Plaintiffs of the following rights: liberty interest and the right to keep their family together; right to privacy; right to due process of law; freedom from summary judgment, abuse of process, and malicious prosecution; and right to reputation.

An examination of the affidavits and exhibits filed with Defendants' Motion for Summary Judgment and Plaintiffs' response to that Motion provides additional facts regarding Plaintiffs' allegations. That examination indicates that just prior to Kara's hospitalization Kara had been at her babysitter's, Patricia Hammet, when Hammet noticed Kara was having difficulties breathing and appeared very limp. Hammet had Kara transported to the emergency room of Aurora Humana Hospital. After various tests were performed on Kara by Dr. James W. McKowan, it was determined that Kara's problems were probably caused by non-accidental trauma or "shaken baby syndrome." Given this determination, Dr. McKowan notified Defendant David Ryan of the Arapahoe County Department of Social Services to address potential child abuse or neglect.

Kara was subsequently transferred to the intensive care unit of Porter Memorial Hospital. Dr. Stephen F. Conner was one of Kara's treating physicians at Porter. He also determined that Kara had most likely suffered from shaken baby syndrome. Therefore, Dr. Conner also made a referral to Social Services.

In response to the referrals of Dr. McKowan and Dr. Conner, Defendant Ryan commenced an investigation into the cause of Kara's injuries. This investigation included speaking with Dr. McKowan, Patricia Hammet, Ruth and Clarence Kimmett, Dr. Hendrika Cantwell, a Denver Department of Social Services physician, Sylvia Rogers, a Porter Memorial Hospital social worker, Mindy Mandell, a Porter Memorial Hospital child health associate, Frances Kimmett, Kara's grandmother, Christopher Kimmett, Kara's stepbrother, and Dr. Frank Martorano,

one of Kara's doctors at Porter Memorial. Based upon this preliminary investigation, on May 8, 1986 Ryan sought and obtained a court order granting temporary custody of Kara to the Arapahoe County Department of Social Services. On the following day, Wadine Gehrke was appointed as *guardian ad litem* for Kara. Gehrke represented Kara at the detention hearing and all subsequent hearings in the case. Kara was eventually released from the hospital to the custody of a foster mother. Further court hearings were held and after about two months Kara was returned to the custody of her parents.

SUMMARY JUDGMENT

Defendants now move for summary judgment pursuant to Rule 56, Fed.R.Civ.P., arguing that they are entitled to qualified immunity. Rule 56 of the Federal Rules of Civil Procedure provides that

> summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c). Consistent with the material fact requirement of Rule 56, the existence of factual disputes which are immaterial to the issues in the case are of no consequence. Only genuine issues of material fact, determined by reference to the substantive law, can preclude entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). In determining whether a movant for summary judgment

has satisfied the burden imposed by Rule 56, all reasonable inferences must be construed in favor of the nonmoving party. *Otteson v. United States*, 622 F.2d 516, 619 (10th Cir. 1980).

PLAINTIFFS' CLAIMS

The Plaintiffs in the Complaint at no time set forth a specific Federal Constitutional right in the pleading. In fact the Constitution is never mentioned or cited in the Complaint. After setting forth a litany of conclusory allegations, the Complaint states:

> 11. By the actions above, Defendants deprived the Plaintiff of the following clearly established and well-settled Constitutional rights.
>
> a. Liberty interest and right to keep their family together
>
> b. Right to privacy
>
> c. Right to due process
>
> d. Freedom from summary judgment, abuse of process and malicious prosecution
>
> e. Right to reputation

In the brief of the Plaintiffs in opposition to the motion for summary judgment, the Plaintiffs again never cite or refer to the Constitution of the United States. The issues of right to privacy, right to due process of law, freedom from summary judgment, abuse of process, malicious prosecution and the right to reputation are never addressed in the brief. There is no case law cited.

The Plaintiffs' sole support of the law is a conclusory statement set forth at page 5 of the brief which is as follows:

> In 1986, the liberty interest in keeping parents and children together; the rights of substantive and procedural due process and the right to be free from misuse and abuse of our legal system were so long settled and so well-known, that not only reasonable social workers, but any reasonable citizen would have known that the Defendants conduct in this matter was wrong.

The total lack of case law or reference to the Constitution of the United States leaves the court with only speculation as to the Constitutional claims. Certainly if the law is "well-known" then the Plaintiff could at least have provided the court with the law.

COLORADO LAW

The legislature of the State of Colorado has had established procedures set up under the Colorado Children's Code for court intervention where there is suspected child abuse or the dependency and neglect of a child. The legislature in 1975 added to the Children's Code the "Child Protection Act of 1975", C.R.S. § 19-10-101 *et seq*. Section 19-10-109(4)(a) places the duty of investigating the suspected child abuse in the county department of social services. A medical doctor after diagnosing a non-accidental injury such as Kara Kimmett's is required by law to report the suspected child abuse injury to the department of social services. § 19-10-104. Section 19-10-107 and 116 provide for an

emergency order by a judge removing the child temporarily from the custody of parents until a petition for dependency and neglect can be filed with the court. A hearing must be held within 72 hours by the court to determine whether a temporary placement out of the home is necessary. § 19-10-107. The parents are entitled to appointment of counsel pursuant to § 19-1-106. According to the Plaintiffs' brief and depositions attached to the brief they were represented by an attorney, Nancy Hutchinson. Nancy Hutchinson testified in her deposition that her clients, Mr. and Mrs. Kimmett, agreed to the custody being placed temporarily in the department of social services at the May 20, 1986 court hearing.

It is the court, not the department of social services that makes the determination whether the child should be temporarily placed outside of the home to ensure the minor child's safety and welfare. *W.H. v. Juvenile Court*, 735 P.2d 191, 193 (Colo. 1987). After the court has entered a temporary order placing the child out of the home, the department of social services does not have the authority to dismiss the dependency petition or to return the child to the parents without court approval. As stated in *People in the Interest of R.E.*, 729 P.2d 1032, 1034 (Colo.App. 1986), if there is an objection to the dismissal by the *guardian ad litem* for the minor child, the court must hold a hearing and determine by the preponderance of the evidence whether the child is neglected. The feelings and beliefs of the Defendant social workers as to whether the child should or should not have been returned to the home would not control the actual placement of the child back with the Kimmetts. Once the court took jurisdiction, the Defendants had no authority to return the child contrary

to the court's orders placing the custody in the department of social services. *Myers v. Morris*, 810 F.2d 1437, 1468 (8th Cir. 1987). After the court order of May 20, 1986 placing the child out of the home and in the care of the department of social services, the Kimmetts through their counsel always had the right to request a periodic review by the court of the placement outside of the home. *People in the Interest of P.L.B.*, 743 P.2d 980, 982 (Colo. App. 1987); § 19-3-109(4). There has been no evidence presented that they made such a request through their attorney. What is clear, the statutes of the State of Colorado provide a due process procedure where the Plaintiffs could have objected to the placement of the child outside of the home and required a hearing before the court. After discussing the matter with their counsel, they did not pursue that due process right.

ABSOLUTE AND QUALIFIED IMMUNITY

What is clear by the affidavits and excerpts of depositions presented by both the Plaintiffs and Defendants in their briefs is that the Defendant social workers followed the procedure as set forth by the Child Protection Act of 1975. It requires an act of discretion by the department of social services' case worker immediately upon a report of child abuse. Here, two medical doctors both made the diagnosis that the child suffered from a shaken child syndrome. There was brain injury. The extent of that injury could only be determined after a period of time of hospitalization. The cause of the injury could not be determined without a full investigation which would take a period of time.

Based upon that discretionary function, the Defendants have raised the defense of qualified immunity. "When the affirmative defense of qualified immunity is properly raised, the plaintiff has the burden of convincing the court that his asserted federal Constitutional or statutory rights were clearly established at the time of the conduct at issue." *Whitcomb v. Jefferson County Department of Social Services*, 685 F.Supp. 745, 747 (D. Colo. 1987); *Lutz v. Weld County School District No. 6*, 784 F.2d 340, 342-43 (10th Cir. 1986). "In deciding whether the law that the defendant allegedly violated was clearly established, the court will examine the law as it was at the time of the defendants actions." *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988). The Plaintiff in meeting that burden must do more than simply identify in the abstract a clearly established right that the individual defendants have violated and the right must be so sufficiently clear that a reasonable person would understand that what he is doing will violate that right. *Pueblo Neighborhood Health Center, supra*, at 645. There also must be some factual relationship with the right that is being violated in relationship to the case law that establishes the right. *Eastwood v. Department of Corrections*, 846 F.2d 627, 630 (10th Cir. 1988).

The Plaintiffs' reliance upon a general statement of law in *Santosky v. Kramer*, 455 U.S. 745 (1981), is taken out of context and does not meet the burden of law. *Santosky* recognizes the state's *parens patriae* responsibility in preserving the welfare of the child. p. 766-767. The issue in *Santosky* is whether due process requires a higher standard of proof in terminating the parents right to the child. The Court held that the evidence must be by a clear and

convincing evidence standard. p. 768-69. Plaintiffs have cited three other cases which have no factual relevance or legal relevance to this case. In *Malley v. Briggs*, 106 S.Ct. 1092 (1986), the Court sets forth the standard of qualified immunity when a police officer relies upon the execution of a search warrant. *Daniels v. Williams*, 106 S.Ct. 662 (1986), establishes that prison officials cannot be sued for negligent injuries caused to inmates pursuant to 42 U.S.C. § 1983. The *Lutz v. Weld County School District*, 784 F.2d 340 (10th Cir. 1986), case involves the qualified immunity of school administrators in discharging handicapped school teachers. The social workers could not reasonably believe that any of the cases cited established a constitutional right of the Plaintiffs to the child in light of the suspected child abuse diagnosed by the medical doctors. In fact, case law places the social worker in the position of possibly being sued pursuant to 42 U.S.C. §1983 if the child was not removed from the home and suffered an injury. *See Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-11 (3rd Cir. 1985). *Contra DeShaney v. Winnebago County Dept. of Social Services*, 812 F.2d 298, 302-304 (7th Cir. 1987) *aff'd*, ___ U.S. ___ (Feb. 22, 1989) (1989 U.S. Lexis 1039).

Judge Jim R. Carrigan addressed a lawsuit very similar to the instant one in the *Whitcomb* case. Amidst a discussion of "clearly established rights" the court stated:

> Undoubtedly, the privacy and autonomy of familial relationships is among the interests protected by the Fourteenth Amendment. However, the interest of the overall family is counterbalanced by interest of a child within that family in freedom from abuse and by the government's interest in protecting powerless children who

> may be subjected to abuse. Moreover, the immediate removal of a child, without parental consent, or without a prior notice and court order, is permissible when there is a substantiated indication that the child's safety is threatened. Thus, the interest in keeping the family unit intact does not eclipse the public interest when child abuse is suspected, and whether plaintiffs' constitutional rights were violated in a particular case would depend on a balancing of these two conflicting interests.

Whitcomb, 685 F.Supp. at 747 (citations omitted).

Judge Carrigan also stated that "where the outcome of a case depends on balancing of competing interests, the law's application is so fact dependant the the law can rarely be clearly established." And that "wherever a balancing of interest is required, the facts of the existing case law must closely correspond to the contested action before the defendant official is subject to liability." *Whitcomb,* 685 F.Supp. at 747 (citations omitted).

If the Plaintiffs had researched the law, they would have found that the case law in all circuits have held that social workers or law enforcement officers who remove children from the home temporarily because of suspected child abuse are protected by either absolute immunity or by qualified immunity. In all cases, the courts have held that the law as to the constitutional right of a parent is not clearly established as to a social worker making the discretionary decision as to whether to remove a child from the home where there is suspected child abuse.

The cases holding that there is absolute immunity are as follows: *Meyers v. Contra Costa County Department of Social Services,* 812 F.2d 1154, 1157 (9th Cir. 1986); *Kurzawa*

v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984); *Ward v. San Diego Department of Social Services*, 691 F.Supp. 238, 240-41 (S.D. Calif. 1988); *Mazor v. Shelton*, 637 F.Supp. 330 (N.D. Calif. 1986); *Hennessey v. Washington Department of Social Services*, 627 F.Supp. 137 (E.D. Wash. 1985); *Pepper v. Alexander*, 599 F.Supp. 523, 526-27 (D. N.M. 1984); *Whelehan v. County of Monroe*, 558 F.Supp. 1093, 1098-99 (W.D. NY 1983). The cases holding that there is qualified immunity are as follows: *Doe v. Hennipin County*, 558 F.2d 1325, 1328-29 (8th Cir. 1988); *Hodorowski v. Ray*, 844 F.2d 1210, 1216-1217 (6th Cir. 1988); *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987); *Whitcomb v. Jefferson County Department of Social Services*, 685 F.Supp. 745, 747-78 (D. Colo. 1987).

The Magistrate finds that the Defendants are protected by qualified immunity if not absolute immunity based upon the affidavits and depositions submitted by both Plaintiff and defense counsel.

RULE 11

The Plaintiffs' Complaint does not set forth any Constitutional claim. As previously indicated, no Constitutional case law has been submitted nor has the Plaintiff at any time specifically set forth any reference to the Constitution of the United States. Even in the brief the court is left with only speculation as to what the Plaintiffs' Constitutional claims are. If the Plaintiffs had done their research, there was ample law establishing clearly the right of qualified and absolute immunity on the part of the social workers. The Magistrate has not found any cases that do not find qualified immunity under the fact situation before this court.

Judges of this court have not been hesitant in using the penalties set forth in Rule 11 F.R.Civ.P. where counsel have failed to have a factual or a legal basis for a claim filed in this court. *See Colorado Chiropractic Counsel v. Porter Memorial Hospital,* 650 F.Supp. 231 (D. Colo. 1987) (Finesilver); *Slane v. Rio Grande Water Conservation District,* 115 F.R.D. 61 (D. Colo. 1987) (Matsch); *Hedahal v. Gilpin County Department of Social Services,* 699 F.Supp. 846 (D. Colo. 1988) (Carrigan); *Storage Technology Partners v. Storcage Technology Corpjoration,* [sic] 117 F.R.D. 675 (D. Colo. 1987) (Kanc); *Rice v. Hamilton Oil Corp.,* 658 F.Supp. 446 (D. Colo. 1987) (Weinshienk).

Judge Kane, in his Orders of June 5, 1987 and October 15, 1987, warned the Plaintiffs that attorney's fees could be awarded and asked counsel to reconsider their cases in light of the facts and rulings in the other department of social services cases. Plaintiffs did not do so. They have provided no law to support the allegations in the Complaint and have totally ignored the well established law that the Defendants were cloaked with either absolute immunity or qualified immunity. In *Hedahal v. Gilpin County Department of Social Services, supra,* Judge Carrigan found that the plaintiff's counsel acted "unreasonably and vexatiously" in permitting the plaintiffs to pursue a claim against the Colorado Department of Social Services when the law was well established that the Colorado Department of Social Services had Eleventh Amendment immunity. Here, counsel failed to set forth any specific Federal Constitutional grounds in the Complaint and after the filing of the motion for sumary [sic] judgment has still failed to provide the court with any legal or

factual grounds to support the allegations of the Complaint. Further, the Plaintiffs have totally ignored the overwhelming case law granting the Defendants qualified immunity under similar facts of this case. Pursuant to Rule 11, I find that the Plaintiffs and their attorney should pay the Defendants' fees and costs.

Accordingly, the Plaintiffs have failed to meet their burden of convincing this court that the law was clearly established and that it prohibited the Defendants' conduct in this case. Therefore,

IT IS RECOMMENDED that Defendants' Motion for Summary Judgment be granted.

FURTHER, IT IS ORDERED that pursuant to rule 603 of the Local Rules of Practice of the United States District Court for the District of Colorado, the parties herein shall have ten (10) days after service hereof to serve and file written, specific objections hereto. If no such objections are timely filed, the Magistrate's proposed findings and recommendations may be accepted by the District Judge and appropriate orders entered without further notice.

Dated at Denver, Colorado this 1st day of March, 1989.

BY THE COURT:

/s/ D.E. Abram
D.E. Abram
United States Magistrate

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

DONALD E. ABRAM (303) 844-6408

CERTIFICATE OF SERVICE

Case Number: 87-8-800

I hereby certify that a copy of RECOMMENDATION BY UNITED STATES MAGISTRATE dated March 1, 1989 entered by Magistrate D.E. Abram was mailed or delivered personally this 1st day of March, 1989 to the following persons:

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Littleton, CO 80166

APPENDIX B

UNITED STATES DISTRICT COURT, DISTRICT OF COLORADO

Case No. 86-K-778

DEPOSITION OF NANCY J. HUTCHINSON

CLARENCE KIMMET, RUTH KIMMET, and KARA KIMMET, an infant, by and through her parents and next friends, CLARENCE AND RUTH KIMMET,

Plaintiff,

vs.

DAVID RYAN, DIANE DENNISON, and ARAPAHOE COUNTY DEPARTMENT OF SOCIAL SERVICES, a department of social services for the State of Colorado,

Defendants.

PURSUANT TO NOTICE and the Federal Rules of Civil Procedure, the above-entitled deposition was taken on behalf of Defendants at 5334 Prince Street, 4th Floor, Littleton, Colorado, on Thursday, January 14, 1988, at 3:55 p.m., before Cheri Tyler, Certified Shorthand Reporter and Notary Public within Colorado.

* * *

(p. 37) it, as I think you're interpreting it, as some kind of a threat.

A. Right.

Q. If you go to this hearing and win and if the child is placed in foster care, they're there for a year?

A. That's essentially it, yes.

Q. It seems to me that you should have known, from your background as an attorney, that that was a totally fallacious statement. That could not occur.

A. I don't know if was a totally fallacious statement.

Q. If you went to the detention hearing and won, the child was not going to be placed in foster care?

A. Let me tell you, since you don't do D and N hearings, that one thing in my experience that occurs as you try to continue to resolve them – I think at that point we were trying to resolve the case as much as we could without waiving any rights or anything else. The intent was to get the child home. The conversation had to do with how can we resolve this case. That's all I can tell you. That is what was said. That is what happened.

Q. So those statements were made, and as a result, your clients decided to enter into the (p. 38) stipulation or agree to the recommendations of the report?

A. Right. Let me explain a little bit further. To the best of my recollection, I think what was happening at that time was we were trying to enter into a stipulation that would alleviate the necessity of going to trial. Were we going to be able to resolve the case. I realize we were obviously there for the initial hearing, and that matter had been set down for trial. We were talking about how to resolve this case, how to get the baby home.

Q. Okay. Do you know from your experience what is the average length of time a child is placed in foster care?

A. My experience has been – and this is based on the cases that I have handled, excluding this case – anywhere from six months to two years.

Q. So when Ms. Dennison made this alleged statement that they're there for a year if they're placed in foster care, did you have any experience at that time to dispute that, or were you basically going along with her statement?

A. I didn't have any experience one way or the other. I was more concerned about my clients who were very, very upset by the remark.